STATE OF MICHIGAN

COURT OF APPEALS

DENNIS GREEN and PATRICIA GREEN,

Plaintiffs/Appellees/Cross-Appellants,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant/Appellant/Cross-Appellee.

UNPUBLISHED
May 11, 1999

No. 205135
Ionia Circuit Court
LC No. 95-016378 CK

Before: Markman, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a July 16, 1997 order denying their motion for a new trial, judgment notwithstanding the verdict (JNOV), or remittitur following a jury trial verdict in favor of plaintiffs. Plaintiffs cross-appeal, raising issues related to the trial and the trial court's order denying their request for twelve percent penalty interest. We affirm in all respects.

This is an insurance dispute concerning the homeowner's insurance policy issued by defendant to plaintiffs. A fire destroyed plaintiffs' house and much of its contents in the afternoon of October 4, 1994, in Lyons, Michigan. The house was insured for a replacement value of up to $100,000, the contents were covered up to $70,000, there were replacement expenses of up to $20,000, and other coverage for debris removal, fire department charges, and landscaping. On December 22, 1994, plaintiffs received a letter from defendant denying their claim. Defendant's two investigators determined that the fire had been intentionally set. However, the State Fire Marshal had three separate investigators go to the scene and all three determined that the fire was caused by the dryer. Defendant denied plaintiffs' claim, determining that plaintiffs had committed arson in intentionally setting the fire and that plaintiffs committed fraud in the presentation of their claim (in the replacement value of the personal property). Plaintiffs then filed suit for breach of contract.

After an eleven-day jury trial, the jury found that plaintiffs did not set fire to their home, that plaintiffs did not commit fraud in the presentment of their claim, that the replacement value of the house was $87,936, that the actual cash value of the house was $30,000, additional living expenses were $6,600, and debris removal expenses were $3,800. The parties stipulated that plaintiffs would be

entitled to $69,133 for the replacement value of the lost contents. Defendant's motion for new trial, JNOV, or remittitur was subsequently denied by the successor trial court.

I

As its first issue, defendant argues that the jury's verdict that plaintiffs did not commit fraud or false swearing is against the great weight of the evidence. We find that the trial court did not err in denying the motion for JNOV because plaintiffs presented sufficient evidence to create an issue for the jury to determine whether plaintiffs actually committed fraud or false swearing in the presentment of their claim for the lost contents. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). Further, the trial court did not abuse its discretion in denying the motion for a new trial on the basis that the verdict was against the great weight of the evidence because the overwhelming weight of the evidence does not favor defendant. *Arrington v Detroit Osteopathic Hosp (On Remand)*, 196 Mich App 544, 564; 493 NW2d 492 (1992).

To void an insurance policy because the insured has wilfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insured would act upon it. *Mina v General Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). In order to prevail on the defense of false swearing, the insurer must prove that the swearing was false, that it was done knowingly, wilfully, and with the intent to defraud. *Id.* Fraud cannot be established from the mere fact that the loss was less than was claimed in the preliminary proofs furnished to the insurer. *Id.*

Here, there is testimony to support the jury's finding that plaintiff did not commit fraud in submitting the proof of loss. Plaintiffs denied at trial that they intended to defraud or mislead and this was a credibility issue to be resolved by the jury. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (the credibility of witnesses and the weight to be given the testimony is a matter within the province of the jury); *Mina, supra*, p 686. Further, fraud cannot be established from the mere fact that the loss was less than was claimed in the preliminary proofs and submitted to the insurance company. *Id.* The trial court properly ruled that it would not substitute its judgment for that of the jury. The motions for JNOV or new trial were correctly denied.

II

Next, defendant argues that the trial court erred in excluding the testimony of defendant's proffered expert witness, Mark Stephanic, a forensic accountant. We review the trial court's decision to exclude the testimony of a proposed expert for an abuse of discretion. *Lopez v General Motors Corp*, 224 Mich App 618, 636; 569 NW2d 861 (1997).

We agree with the trial court's ruling that the proposed testimony would have been both speculative and cumulative. Stephanic would have testified that it was not possible for plaintiffs to purchase the amount of property they claimed based on their available cash and that it was his opinion

that plaintiffs' claim constituted a material misrepresentation. The trial court, however, noted that this proposed testimony would have been speculative because there was no consideration regarding whether some of the items were gifts or whether plaintiffs received any loans. In denying the motion for JNOV, the trial court also indicated that "the testimony would allow speculation without knowing how much credit was obtained and used in the acquisition of the property or whatever manner the plaintiffs used to acquire the property." The trial court also ruled that the evidence would be cumulative because defendant had included the testimony of Richard Guider, an adjuster hired from a different company to investigate the contents claim, who stated his belief that there could not have been the amount of items in the closet as testified to by plaintiffs and that the total contents claim was far less than submitted by plaintiffs. Defendant was also permitted to include a great deal of evidence concerning plaintiffs' debts, misstatements made on previous tax returns, and on a loan refinancing application. Such evidence was used by defendant to show that plaintiffs had a motive to commit arson and fraud.

On the authority of *Smith v Michigan Basic Property Ins Co*, 441 Mich 181, 196-197; 490 NW2d 864 (1992), we find that the trial court did not abuse its discretion in denying the proffered expert testimony:

> Michigan Basic contends that an examination of the inventory reflects that the Smiths claimed to have acquired well in excess of $5,000 of personal property within the two years immediately preceding the fire, and that evidence of their financial condition would be probative of the issue of fraud in reporting the loss because such evidence would tend to show that it was improbable that the Smith's had, in fact, acquired property in the amount claimed.
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> The inventories of personal property included property belonging to five children. The two oldest were seventeen or older at the time of the fire. Myrtle Smith testified that some of the property was not new when acquired, and was acquired at garage sales, yard sales, porch sales, and moving sales. The judge's ruling barring the introduction of evidence of the Smith's financial condition would not be an appropriate basis for disturbing the verdict.

Similarly, plaintiffs had lived in their house for three years before the fire, had two daughters at the time of the fire, and Mrs. Green was a self-styled "garage sale queen." Further, when receipts were found, they were turned over to defendant. We agree with the trial court that the testimony would have been cumulative and speculative.

III

As its last issue, defendant argues that the trial court erred in giving conflicting jury instructions regarding the affirmative defense of fraud or false swearing. We find no error requiring reversal.

In this case, the trial court ultimately instructed the jury regarding the fraud or false swearing issue by giving both instructions proposed by the parties. Defendant's proposed instruction mirrored the elements set forth in *Mina*, while plaintiffs' proposed instruction was derived from the standard jury

instructing concerning fraud in a tort action. "Where a court gives conflicting instructions, one of which is erroneous, we generally presume that the jury followed the erroneous instruction." *Sudul v Hamtramck*, 221 Mich App 455, 461; 562 NW2d 478 (1997), citing *Kirby v Larson*, 400 Mich 585, 606-607; 256 NW2d 400 (1977). The trial court should have instructed the jury of the elements of fraud or false swearing as set forth in *Mina*, a case which was available at trial and which directly addresses the elements of the affirmative defense of fraud or false swearing.

In the present case, we find any instructional error in this regard to be harmless. Defendant complains that the erroneous instruction was that the insurer in fact relied on the false representation, when *Mina* instructs that the element is that the insured made the material misrepresentation with the intention that the insurer would act upon it. Here, the parties' theories and the applicable law were adequately and fairly presented to the jury because the trial court did give defendant's proffered instruction. Further, the parties did not argue to the jury that defendant in fact relied on any representation, thus this issue was not raised before the jury. Moreover, the jury expressed no confusion regarding the fraud defense. Under these circumstances, the error in giving the erroneous instruction was harmless because it had not resulted in such unfair prejudice to defendant that failure to vacate the jury verdict would be inconsistent with substantial justice. MCR 2.613(A); *Johnson v Corbet*, 423 Mich 304, 326-327; 377 NW2d 713 (1985); *Jennings v Southwood (After Remand)*, 224 Mich App 15, 22; 568 NW2d 125 (1997).

IV

In their cross-appeal, plaintiffs first argue that the trial court erred in denying their request for twelve percent penalty interest under MCL 500.2006; MSA 24.12006. Plaintiffs argue that the trial court applied the wrong standard in denying the request and that under the correct standard, plaintiffs' claim was not reasonably in dispute. Plaintiffs contend that they are entitled to twelve percent interest as a matter of law, or alternatively, that this Court should remand for the trial court to determine whether the claim was reasonably in dispute.

An insurer is subject to a penalty provision of twelve percent interest if it fails to pay claims on a timely basis unless the claim is reasonably in dispute. MCL 500.2006(1); MSA 24.12006(1). The trial court denied plaintiffs' request for such interest, finding that defendant did not, in bad faith, deny the claim. Although plaintiffs are correct that the trial court applied the wrong standard, bad faith on the part of an insurer in a first-party claim is not a requirement under the statute, we find that the error is harmless. In considering the issues at trial, including the evidence of plaintiffs' rather dire financial situation, and that defendant's two investigators believed that the fire had been set intentionally, defendant had a reasonable basis to initially reject plaintiffs' claim.

Accordingly, in light of the issues tried before the jury and the obvious factual issues that had to be resolved, we find that the claim was reasonably in dispute and the trial court's decision to deny penalty interest under MCL 500.2006; MSA 24.12006 was not erroneous.

V

Plaintiffs also argue that the trial court erred in denying their motion for a directed verdict regarding defendant's defense of fraud or false swearing. We have already indicated in issue I, *supra,* that there were factual issues, including credibility findings, to be resolved by the jury with regard to the defense of fraud or false swearing. We would not agree with plaintiffs, in any event, that they were entitled to judgment as a matter of law on this defense because factual questions existed upon which reasonable minds could differ. *Allen v Owens-Corning Fiberglas Corp,* 225 Mich App 397, 406; 571 NW2d 530 (1997). The trial court did not err in denying plaintiffs' motion for a directed verdict regarding the defense of fraud or false swearing.

VI

Plaintiffs also contend that if a new trial is ordered then this Court should find that the trial court erred in instructing the jury that fraud need be proved by a preponderance of the evidence rather than by clear and convincing evidence. Because we are not ordering a new trial, we need not further address this issue.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kathleen Jansen